Supreme Court, U. S.
FILED
JUL 9 1975
MICHAEL RODAK, JR., CLERK

No. 74-1437

In the Supreme Court of the United States

OCTOBER TERM, 1975

ALBERT ROELOFS, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that they are entitled to recover damages from the United States under the Federal Tort Claims Act, even though, had the government been a private person, it would have been immune from suit under applicable state law.

Pursuant to a contract with the United States Army, Sperry Rand Corporation operates an ammunition manufacturing plant on government property near Shreveport, Louisiana. Sperry hires the employees, prepares and loads the ammunition for shipping, and generally does all things necessary to operate the plant, being paid by the government on a cost-plus-fixed-fee basis. Pursuant to federal regulations (41 C.F.R. 1-10.502-1), the contract requires Sperry to maintain workmen's compensation insurance for its employees, and the government reimburses it for the insurance premiums as a contract expense item.

The present suits, which were consolidated below, were filed in the United States District Court for the Western District of Louisiana against the United States, under the Federal Tort Claims Act, by or on behalf of eleven Sperry employees who were injured or killed in 1967. By virtue of the workmen's compensation insurance carried by Sperry, all petitioners have received or will receive workmen's compensation benefits (Pet. 6; Pet. App. 30, n. 20).

The United States asserted as an affirmative defense that it was not subject to suit under the Tort Claims Act because the Act waives sovereign immunity only "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b); see also 28 U.S.C. 2674), and that as a "principal" or "statutory employer" under the Louisiana Workmen's Compensation Act (La. Rev. Stat. 23:1061), the United States would not be subject to tort liability if it were a private person.

The district court acknowledged that "[i]f the United States were a private individual, partnership or corporation, admittedly, it would qualify as a statutory employer within the meaning of the Act and the exclusive remedy of the employees of the contractor would be under Louisiana's Workmen's Compensation Act" (Pet. App. 16). The court nevertheless granted petitioners' motion to strike the government's jurisdictional defense, holding that to rule that the United States was entitled to assert the tort immunity of a private "principal" would be tantamount to "permit[ting] an employee of a private contractor, theoretically, to sue the Government for an award [under the Louisiana workmen's compensation system] * * *" (Pet. App. 20), a result that the court viewed as inconsistent with the government's sovereign immunity from workmen's compensation claims.

On the government's interlocutory appeal, the court of appeals reversed (Pet. App. 21-31), reasoning that Louisiana law did not intend a "double payment of compensation, once by the 'actual' employer and once by the 'statutory' employer" (Pet. App. 29), and that, because the government had in fact assured the availability of adequate workmen's compensation coverage, it was entitled to the same immunity a private employer would have in its position (Pet. App. 30-31).

1. Petitioners' contention (Pet. 8) that the court of appeals' decision creates a new exemption not expressly set forth in the Tort Claims Act is without substance. The Act subjects the United States to tort liability only "where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 1346(b)), and only "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 2674. The decision below, in conferring on the United States the tort immunity of a "principal" under Louisiana law, does not add any exemption to those set forth in 28 U.S.C. 2680; it merely recognizes that the Act does not waive sovereign immunity where, as here, the United States, if a private person, would not have been liable under local law.[1]

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[1]Accordingly, there is no merit to petitioners' claim that the decision below conflicts with this Court's decisions in *United States* v. *Brown*, 348 U.S. 110, and *United States* v. *Muniz*, 374 U.S. 150. Neither dealt with the question whether, if a private person, the United States would be liable under local law. In *Brown* the Court held that the payment of a veterans' compensation award on account of an injury did not preclude recovery under the Tort Claims Act if available under local law, noting that unlike "the usual workmen's compensation statute * * * the right to [veterans'] compensation [was not made] the veteran's exclusive remedy * * *." 348 U.S. at 113. *Muniz* similarly held only that if a prisoner were entitled under local law to recover for negligent treatment, the Act would not preclude recovery.

2. Contrary to petitioners' contention (Pet. 8-9), Louisiana law significantly differs from that of most other states with regard to the liability of a principal employer. As the court of appeals noted (Pet. App. 24-25), although many states have provisions making a person who lets a contract liable, as a "statutory employer," for workmen's compensation claims by the employees of the contractor, apparently only Louisiana courts have construed such a provision as immunizing the principal employer from suits for damages that would otherwise be allowed against a third party who is liable with respect to the injury.[2] The application of this settled rule of Louisiana law to the United States in the context of a suit under the Federal Tort Claims Act may be, as petitioner suggests (Pet. 9), "interesting and novel," because of the uniqueness of Louisiana law, but it does not involve any legal question warranting further review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]Petitioners do not challenge the court of appeals' interpretation of Louisiana law on this point.